June 11, 2014

Via ECF

The Honorable Lorna G. Schofield
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *Simmtech Co., Ltd.* v. *Barclays Bank PLC, et al.*, No. 13-cv-7953 ("*Simmtech*"); *Oddvar Larsen* v. *Barclays Bank PLC, et al.*, No. 14-cv-1364 ("*Larsen*")

Dear Judge Schofield:

Defendants in the above actions write to bring to Your Honor's attention an opinion issued by the United States Court of Appeals for the Second Circuit on June 4, 2014: *Lotes Co., Ltd. v. Hon Hai Precision Indus. Co., Ltd.*, No. 13-2280, ---F.3d--- , 2014 WL 2487188 (2d Cir. June 4, 2014).

In *Lotes*, the Court held that "the requirements of the FTAIA go to the merits of an antitrust claim rather than to subject matter jurisdiction." *Id.* at 24. In so doing, the Court overruled its prior decision in *Filetech S.A. v. France Telecom, S.A.*, 157 F.3d 922 (2d Cir. 1998), in which the Court had held that the FTAIA was jurisdictional in nature. In view of the decision in *Lotes*, a motion to dismiss for failure to satisfy the FTAIA should now be brought pursuant to Federal Rule of Civil Procedure 12(b)(6).

On May 30, 2014, Defendants moved pursuant to Rule 12(b)(1) to dismiss Simmtech's and Larsen's Sherman Act Section 1 claims for lack of subject matter jurisdiction. (*Larsen* Dkt. 51; *Simmtech* Dkt. 83 ("Supp. Mot.")). In their brief, Defendants acknowledged the disagreement among courts as to whether the FTAIA is jurisdictional or, instead, sets forth an additional element of an antitrust claim. (Supp. Mot. at 5 n.4.) Defendants also noted that, whether evaluated under 12(b)(1) or 12(b)(6), the analysis and result are the same: Simmtech's and Larsen's Sherman Act Section 1 claims should be dismissed under the FTAIA. *See In re Dynamic Random Access (DRAM) Antitrust Litig.*, 546 F.3d 981, 985 n.3 (9th Cir. 2008) (affirming dismissal under FTAIA where the "result and analysis are the same" whether the statute is viewed as jurisdictional under Rule 12(b)(1) or establishing an element of the claim under Rule 12(b)(6)).

In *Lotes*, the Second Circuit also addressed the "domestic effects" exception to the general prohibition on extraterritorial application of the antitrust laws, but the Second Circuit's decision does not cure the pleading defects in the *Simmtech* and *Larsen* complaints. The Court noted that the domestic effects exception has two requirements: (1) the foreign conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce; and (2) that effect "gives rise to a claim under" the Sherman Act. *Lotes*, slip op. at 45-46. With respect

to the first requirement, the *Lotes* Court rejected the Ninth Circuit's formulation that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity[,]" *United States v. LSL Biotechnologies, Inc.*, 379 F.3d 672 (9th Cir. 2004). Instead, the Second Circuit held that conduct can have a "direct, substantial, and reasonably foreseeable effect" where there is a "reasonably proximate causal connection between the conduct and the effect." *Lotes*, slip op. at 5. As set forth in Defendants' supplemental motion to dismiss, those complaints contain no allegations showing that the alleged foreign conduct had any causal connection with U.S. commerce, let alone a reasonably proximate one. (*See* Supp. Mot. at 8-10.)

The Second Circuit made no change to the second requirement of the domestic effects exception—that the alleged effect "gives rise to" plaintiffs' Sherman Act claim. Indeed, the Second Circuit affirmed the district court's dismissal of the plaintiff's Sherman Act claim specifically because any alleged domestic effects of defendants' foreign conduct "did not 'give[] rise to' Lotes's claims." *Lotes Co.*, slip op. at 45 (citing 15 U.S.C. § 6a(2)). The same is true here. Defendants' supplemental motion to dismiss demonstrates that, as in *Lotes*, both Simmtech and Larsen have failed to plead that any alleged domestic effect of defendants' purported conduct "gives rise" to their alleged antitrust injuries in South Korea and Norway, respectively. (*See* Supp. Mot. at 10-13.)

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This letter is respectfully submitted on behalf of the undersigned Defendants by their counsel:

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